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Attorney for Defendant  
 OSHAN COOK

IN THE UNITED DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	<b>NO. CR-10-0376-JSW</b>
	)	
Plaintiff,	)	<b>DEFENDANT COOK'S REPLY TO</b>
	)	<b>UNITED STATES' SUPPLEMENTAL</b>
vs.	)	<b>MEMORANDUM IN OPPOSITION</b>
	)	<b>TO MOTION TO SUPPRESS</b>
OSHAN COOK,	)	<b>EVIDENCE</b>
	)	<hr/>
	)	<b>DATE: TBD</b>
Defendant.	)	<b>TIME: TBD</b>
	)	<b>COURT: 11, 19<sup>TH</sup> Floor</b>
	)	<b>JUDGE: Hon. Jeffrey S. White</b>

At the outset of its memorandum in opposition to Defendant's motion, the government invokes Magistrate Judge Zimmerman's finding of probable cause based on an affidavit submitted by DEA Agent Bush to counter Defendant's contention that his arrest was not supported by probable cause. But the government's reliance on this determination is misconceived, since a crucial part of Agent Bush's affidavit was based on facts not known prior to Defendant's arrest – the discovery of approximately one pound of suspected MDMA and several vials of liquid LSD in Defendant's backpack. In relying on the Magistrate's determination, the government is effectively asking this Court to take into consideration what was found in the search of Defendant's property to establish the validity of the search.

It is, however, hornbook law that a search cannot be justified by its fruits. As the

1 Supreme Court has said:

2 “We have had frequent occasion to point out that a search is not to  
3 be made legal by what it turns up. In law it is good or bad when it  
4 starts and does not change character from its success.” *United States*  
5 *v. DiRe*, 332 U.S. 581, 595 (1948).

6 Magistrate Judge Zimmerman was not asked to determine whether probable cause existed  
7 for Defendant’s arrest prior to the search of his backpack, and did not do so. That question is  
8 presented, for the first time, to this Court.

9 But, beyond its erroneous suggestion that Magistrate Judge Zimmerman has resolved the  
10 question, the government’s submission is more confusing than it is enlightening.

11 Predictably, the government tries to minimize the importance of the two facts which it  
12 relied on exclusively in its previous presentation to this Court. Instead, the government claims  
13 that the agents had a “plethora” of probable cause for the arrest of Defendant. In reality,  
14 however, what the agents had was a plethora of inconsistent and contradictory facts which raised  
15 more questions than they answered. The government, as did the agents, seeks to pick and choose  
16 among the facts to find those which support probable cause, and invites the Court to do the same.  
17 This selectivity, however, is impermissible. Since “the police may rely on the totality of facts  
18 available to them in establishing probable cause, they also may not disregard facts tending to  
19 dissipate probable cause.” *Bigford v. Taylor*, 834 F.2d 1213, 1218 (5<sup>th</sup> Cir. 1988).

20 With respect to Defendant’s alleged delivery of the MDMA to Edmonds on the morning  
21 of April 22, 2010, sometime prior to Edmonds’ sale of MDMA to undercover agents, the  
22 government appears to have retreated from its suggestion that observations made by the agents  
23 themselves provided cause to believe that Defendant had delivered drugs. Rather, the  
24 government now appears to rely on statements made by co-defendant Yuri Lambert shortly after  
25 his arrest. Lambert’s statements purport to resolve the inconsistency between assertions made  
26 both by him and by Edmonds during negotiations that Edmonds had the MDMA in his  
27 possession and the agent’s theory that Defendant Cook delivered the MDMA the next morning.

1 Lambert suggests that Edmonds did indeed have the MDMA in his possession during the  
2 negotiations, but that Cook retrieved it on the evening of April 21 and returned it on the morning  
3 of April 22.

4       There are three problems with the government's reliance on Lambert's assertion: first, it  
5 is not based on Lambert's knowledge, but explicitly on his "belief" about what happened.  
6 Second, it provides a scenario that is inherently improbable. Third, and most important, it is  
7 explicitly denied and contradicted by Edmonds himself, who asserted unequivocally that  
8 Defendant Cook did not deliver the MDMA on the morning of April 22, 2010, a fact which the  
9 government attempts to obscure.

10       With this background, the best the government can muster is the obfuscatory statement  
11 that "[g]iven the circumstances, agents had *reason to believe that it was unclear* whether the  
12 powder MDMA was returned and re-delivered." (Emphasis supplied, Supp. Memo, at p.4). By  
13 the government's reckoning, therefore, Edmonds' direct statement to the contrary "did not  
14 detract from the probable cause for Cook's arrest." (*Ibid.*).

15       The government is, if anything, even more cavalier in its treatment of the facts  
16 surrounding Edmonds' phone call and Defendant's subsequent arrival. As with the delivery  
17 issue, the government seeks to pick and choose among the facts, and present only those which  
18 support its theory of probable cause. Thus, the government represents that Edmonds placed two  
19 telephone calls "that were not answered and that went to voicemail." It ignores, however, the  
20 fact that the voicemail message was that of a woman named Anita, an inconvenient fact to be  
21 sure. But the implications of this fact are entirely unclear, since it does not appear that the  
22 agents made any effort to determine who "Anita" is, or whether the phone number that Edmonds  
23 dialed had anything whatever to do with Defendant Cook.

24       Rather, the government relies entirely on the fact that Cook called Edmonds shortly  
25 thereafter and engaged in a suggestive, but entirely vague conversation, with some elements that  
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1 coincided and some that conflicted with the agents' theory.<sup>1</sup>

2       The agents, and the government, ignore another glaring inconsistency in the information  
3 which the agents had prior to the arrest of Defendant Cook. As reflected in the report of  
4 Edmonds' statement (p. 95, Exhibit A to Declaration of Doron Weinberg in Support of  
5 Defendant Cook's Supplemental Memorandum), immediately after his arrest Edmonds told the  
6 agents that he "was reluctant to talk because he was afraid of what the supplier of the powder  
7 MDMA . . . would do to him and/or his loved ones." Edmonds was apparently given some time  
8 to think the matter over, and reasserted that he "was afraid for himself and his family." But at  
9 some point thereafter, under circumstances which the report leaves entirely unclear, Edmonds  
10 identified his supplier as "Oshan," but then stated that Oshan "was not a violent person." (*Ibid.*).

11       Plainly, the agents failed to inquire of Edmonds, or undertake any other efforts to  
12 determine the truth of any of the statements made to them by Edmonds or Lambert. But the  
13 agents knew that they were dealing with newly-arrested informants, whose statements should  
14 have been viewed with heightened skepticism. As the Supreme Court has noted, "a person  
15 arrested in incriminating circumstances has a strong incentive to shift blame or downplay his  
16 own role in comparison with that of others, in hopes of receiving a shorter sentence and leniency  
17 in exchange for cooperation." *Williamson v. United States*, 512 U.S. 594, 607-08 (1994).

18       Here, neither Lambert's nor Edmonds' statements were declarations against penal  
19 interests, inasmuch as both of them had been apprehended in the commission of a crime, and  
20 neither admitted to anything beyond what the agents plainly knew. Indeed, both minimized their  
21 criminal involvement. The report of Edmonds' statement reveals that Edmonds claimed that this  
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24       <sup>1</sup> The agents, and the government, attempt to bolster the significance of this phone call  
25 by suggesting that the caller, ostensibly the MDMA supplier, said that he would see Edmonds  
26 "shortly" (Supp. Memo at p.5), and Defendant Cook arrived at Edmonds' apartment shortly  
thereafter. In fact, however, the government's own transcription of the telephone conversation  
quotes the caller as saying "OK, I'll see you then."

1 was his first involvement in drug sales “on this scale.” (p. 11). He further claimed that all of the  
2 MDMA found at his apartment was given to him by Defendant Cook and, most incredibly, that  
3 he was expected to turn over the entire proceeds of the sale to Cook, thus claiming that he was to  
4 derive no profit from the sale of the MDMA.

5 Despite these warning signals, the agents exercised no independent judgment, let alone  
6 skepticism. They simply accepted the allegations that supported probable cause to arrest  
7 Defendant Cook, and discarded those that conflicted. In doing so, the agents plainly failed to  
8 satisfy the constitutional standard that requires objective probable cause to support an arrest and  
9 search.

10 Defendant submits that the evidence before the Court is sufficient to establish the  
11 illegality of Defendant’s arrest. However, should the Court conclude that an evidentiary hearing  
12 is necessary to determine what the agents knew, when they knew it, and why they failed to  
13 consider conflicting information within their knowledge, Defendant would request the hearing be  
14 scheduled either for December 8 or December 22, 2011.

15 Respectfully submitted,

16 LAW OFFICES OF DORON WEINBERG

17  
18 Dated: November 28, 2011

19 /s/ Doron Weinberg  
20 DORON WEINBERG

21 Attorney for Defendant  
22 OSHAN COOK  
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